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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC JON BOISSONNAULT,

Defendant and Appellant.

D074470

(Super. Ct. No. SWF1500740)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed.

Rachel Paige Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler and Julie L. Garland, Assistant Attorneys General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Eric Jon Boissonnault of assault by means of force likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(4); count 1) and active participation in a criminal street gang (§ 186.22, subd. (a); count 2). It found true that Boissonnault committed count 1 for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)). In bifurcated proceedings, Boissonnault admitted he suffered three prior prison convictions under the "Three Strikes" law. The court sentenced him to 11 years in prison as follows: four years on count 1 plus four years on the gang enhancement and three years on his prior prison convictions. It stayed the count 2 sentence under section 654.

Boissonnault contends: (1) the evidence regarding the gang's primary activities was insufficient to support both the count 2 conviction and the gang enhancement; (2) he received ineffective assistance of counsel, who failed to object to the gang expert's testimony regarding the gang's primary activities; and (3) the court prejudicially erred in instructing the jury about the corroboration requirement for accomplice testimony. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A Riverside Sheriff's Department correctional officer on duty at the Southwest Detention Center's protective custody unit, testified that on April 25, 2015, an inmate with a bloodied head and face pounded a glass window to get the officer's attention. The officer removed the victim from harm's way and sent him to the nurse for medical care.

¹ Undesignated statutory references are to the Penal Code.

The victim did not tell the officer how he got the injuries. The officer was not surprised because inmates look down on those who testify against them. The officer checked surveillance videos and saw that Boissonnault and other inmates, including Michael Miranda and Rogelio Roberts, had assaulted the victim. The videos were played for the jury.

Roberts, an Independent Rider gang member, testified that he had pleaded guilty to assaulting the victim in that incident (§ 245, subd. (a)) and admitted he did it for the gang's benefit (186.22, subd. (a)). Roberts identified Boissonnault as a "shot caller," meaning the gang's most influential member. The prosecutor asked Roberts about the portion of the video showing Boissonnault, Roberts and Miranda discussing something before they attacked the victim: "And when you're making a decision to—all three of you, to assault [the victim], what does that do for the gang?" Roberts replied, "Um, gets stuff done that we had to get done." Roberts added that the assault "gets the people that we don't want involved in Independent Rider out of it."

On cross-examination, Roberts testified he did not join the gang to engage in criminal activity but for mutual protection. He described the Independent Riders as a "brotherhood" whose primary purpose is to "[k]eep each other safe." Defense counsel asked Roberts, "Is it true that what happened on April 25th, 2015, in your mind, even though that was an assault, that in actuality your feeling was that in the end you're actually helping people not get assaulted even though an assault just took place?" Roberts responded, "Yeah, I mean, we just went there to do what we had to do." Roberts agreed with defense counsel that the Independent Riders was "not really like a true gang."

Miranda, another Independent Riders member, also pleaded guilty to the assault and admitted a gang enhancement. He identified Boissonnault and Roberts as Independent Riders members. On cross-examination, Miranda testified he was attracted to the gang because it was like a brotherhood and a family.

Gang expert Spencer Rustad, a Riverside County Sheriff's Department deputy, testified he was assigned to the gang investigations unit at the Southwest Detention Center for about three years. Rustad's duties consisted of "document[ing] gang members, the gangs itself [*sic*], collecting [intelligence] on these gangs, analyzing that [intelligence] and applying it to our daily practice of how we house inmates and how we try to keep both inmates and the public safe." He had given presentations to new deputies about gang investigations and documentation of gang members.

Throughout his career, Rustad interviewed "hundreds and hundreds" of gang members from over a hundred gangs. He interviewed many Independent Riders members in investigating this case. Rustad spoke to Boissonnault between 20 and 30 times over the years while documenting Independent Riders gang members and the gang's culture, allegiances and rivals. Boissonnault confirmed he is an influential Independent Riders leader, and invited Rustad to speak to him directly if any problems arose in the housing unit.

The expert discussed the present incident with Boissonnault and recorded their conversation, which was played for the jury. Boissonnault said the assault involved the "stripping" of the victim, meaning his removal from the gang.

Rustad testified regarding Independent Riders' primary activities as follows:

"[Prosecutor:] Do you have an opinion as to what [the gang's] primary activities are?

"[Rustad:] Yes, ma'am.

"[Prosecutor:] What is your opinion based on?

"[Rustad:] It's based on previous investigations, reports that I have read, conversations I've had with other gang investigators and members of Independent Riders.

"[Prosecutor:] And have you personally been involved in investigations that were primary activities of Independent Riders?

"[Rustad:] Yes.

"[Prosecutor:] And what are those primary activities?

"[Rustad:] Extortion, felony vandalism, narcotic smuggling and sales. Most notably in common, though, would be felony assault."

Rustad testified about a specific assault committed by Edgar Silva and Eric Godina of the Independent Riders. He also testified about Roberts's and Miranda's guilty pleas regarding their involvement in the underlying incident. Rustad testified that in 2016, the Independent Riders and another gang were primarily responsible for carrying out between 40 and 50 assaults in the detention center's protective custody unit. When asked what it means for a gang member in a jail setting to "put in work" on the gang's behalf, Rustad explained, "So a good example of putting in work in the custodial environment, in jail would be assaulting someone on behalf of or for the benefit of the gang."

Rustad concluded the Independent Riders is a gang within the meaning of section 186.22 because it has over 300 members, it has common signs or symbols, and its members have displayed a pattern of criminal acts, including assaults with a deadly weapon or by means likely to produce great bodily injury. He also stated that the gang commits assaults to increase its notoriety and supremacy in jail.

DISCUSSION

I. Sufficiency of the Evidence Claim

Boissonnault contends the evidence was insufficient to support the active gang participation conviction and the gang enhancement because it did not show that the Independent Riders' primary activities included the commission of a crime listed in section 186.22, subdivision (e).

Section 186.22 subdivision (e) states: "As used in this chapter, 'pattern of criminal gang activity' means the commission of, attempted commission of, conspiracy to commit, or solicitation of . . . or conviction of two or more of the following [enumerated] offenses, provided at least one of these offenses occurred after the effective date of this chapter and the last of these occurred within three years after a prior offense, and the offenses were committed on separate occasions, or by two or more persons." The crime committed here, assault with a deadly weapon or by means of force likely to produce great bodily injury, is a crime enumerated in section 186.22, subdivision (e).

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable,

credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' " (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The California Supreme Court held in *People v. Sengpadychith* (2001) 26 Cal.4th 316: "Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996) 14 Cal.4th 605]. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subds. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (*Sengpadychith, supra*, at p. 324.)

Expert testimony is often used to help prove gang allegations. "While lay witnesses are allowed to testify only about matters within their personal knowledge [citation], expert witnesses are given greater latitude. 'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' [Citation.] An expert may express an opinion on 'a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.' " (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.)

We conclude that as in *People v. Gardeley, supra*, 14 Cal.4th 605, expert Rustad's testimony here sufficed to establish the Independent Riders' primary activities. He had worked in the detention gang unit for three years and investigated numerous crimes committed by Independent Riders, interviewing its members and associates, including Boissonnault, who participated in this assault. Because of his expertise, Rustad trained other deputies about it. He testified that one of the Independent Riders' primary activities was assaulting inmates, and cited as examples this case and another committed by Silva and Godina. He also stated that in 2016 alone the Independent Riders and another gang had committed between 40 and 50 assaults. Rustad's conclusions are also supported by testimony from Rogers and Miranda that the Independent Riders committed assaults in jail, and about their attack upon the victim here, which involved concerted, preplanned action by the Independent Riders.

The cases Boissonnault relies on are inapplicable because in each one the testimony regarding the gang's primary activities was conclusory and insufficient.

Further, those cases distinguish *People v. Gardeley*, *supra*, 14 Cal.4th 605, in which the expert's testimony sufficed to support a finding regarding the gang's primary activities. (*People v. Sengpadychith*, *supra*, 26 Cal.4th at p. 324; accord, *In re Alexander L.* (2007) 149 Cal.App.4th 605, 612-613 [pointing out that in *Gardeley*, the gang expert's testimony was based on a proper foundation]; *People v. Perez* (2004) 118 Cal.App.4th 151, 160 ["No expert testimony such as that provided in [*Gardeley*] was elicited here."].)

II. *Ineffective Assistance of Counsel Claim*

Boissonnault contends his trial counsel violated his constitutional rights by providing ineffective assistance; specifically, he claims counsel failed to request that the prosecutor introduce into evidence a certified case file of Silva's conviction for assault. Boissonnault contends the expert thus violated *People v. Sanchez*, *supra*, 63 Cal.4th 665 by testifying about case-specific details of the Silva assault that were inadmissible hearsay: "This is because the offenses charged incorporated the prior assault as a primary activity, as part of the gang enhancement and substantive gang offense. It is unclear from the record where Rustad got his information, although he testified that his opinion as to the primary activities of Independent Riders was based on " 'previous investigations, reports that [he had] read, [and] conversations [he] had with other gang investigators and members of Independent Riders.' "

All defendants in criminal proceedings have a constitutional right to effective assistance of counsel. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient such that it "fell below an objective standard of

reasonableness" and that the deficient performance resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692.) To show prejudice, a defendant must establish by a reasonable probability that if counsel's performance was not deficient, he would have received a more favorable result. (*Id.* at p. 694.) In considering a claim of ineffective assistance of counsel, it is not necessary to determine " 'whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*In re Fields* (1990) 51 Cal.3d 1063, 1079, quoting *Strickland*, at p. 697.) "In general, reviewing courts defer to trial counsel's tactical decisions in assessing a claim of ineffective assistance, and the burden rests on the defendant to show that counsel's conduct falls outside the wide range of competent representation. [Citations.] In order to prevail on such a claim on direct appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission." (*People v. Ray* (1996) 13 Cal.4th 313, 349.)

Boissonnault has not established that his trial counsel provided ineffective assistance in failing to request that the prosecution introduce the certified case file of Silva's conviction into evidence. Defense counsel could have reasonably determined that the detective's testimony pertaining to these events was less damaging to Boissonnault's case than the introduction of the certified case file unequivocally proving the conviction. Accordingly, Boissannault has not established the "lack of a rational tactical purpose" (*People v. Ray, supra*, 13 Cal.4th at p. 349) for defense counsel's failure to request that

the prosecution introduce the certified case file in evidence. For this reason, we need not address the issue of whether the Silva case was "case-specific" under *People v. Sanchez*, *supra*, 63 Cal.4th 665.

III. *Instructional Error Claim*

Boissonnault relies on this court's ruling in *People v. Smith* (2017) 12 Cal.App.5th 766, 781 for his contention the court prejudicially erred in instructing the jury with CALCRIM No. 301 that all accomplice testimony required corroboration, when in fact no such requirement exists regarding exculpatory accomplice testimony. Boissonnault purports to find exculpatory Roberts's and Miranda's testimony that they joined the Independent Riders for their safety and the sense of brotherhood it provided, arguing their testimony "supported the theory that the Independent Riders were [*sic*] not a criminal street gang." He claims he suffered prejudice because "had the jury not been erroneously instructed that all accomplice testimony required corroboration, it is reasonably probable that the jury would not have concluded the Independent Riders constituted a criminal street gang and therefore would not have found [him] guilty of count two or the gang allegation to be true."

The court instructed the jury with CALCRIM No. 301 as follows: "Except for the testimony of Rogelio Roberts and Michael Miranda which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." The court further instructed the jury with CALCRIM No. 335, which states in relevant part: "You may not convict the defendant of assault with force likely to cause great

bodily injury, its lesser included offense of simple assault, or active participation in a criminal street gang based on the testimony of an accomplice alone. You may use the testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice's testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice's testimony; [¶] and [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes."

Section 1111 provides that "[a] conviction [cannot] be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." In *People v. Smith, supra*, 12 Cal.App.5th 776, this court reviewed section 1111 and determined that "[e]xculpatory testimony, by definition, cannot be said to support a conviction and, thus, need *not* be corroborated." (*Id.* at p. 780.) We therefore found that a modified version of CALCRIM No. 301 was erroneous in stating that "[t]he testimony of any other person you determine to be an accomplice also requires supporting evidence." (*Smith*, at p. 780.) Without deciding which harmless error standard applied, we found that even under the *Watson* standard, there was "more than an abstract possibility that the instructional error affected the verdict in this case." (*Smith*, at p. 781.) In particular, we noted that a lone hold-out juror was ultimately dismissed because he was unwilling to follow the court's erroneous instruction regarding the need for corroboration of any accomplice testimony, including exculpatory testimony. (*Ibid.*) In other words, the lone hold-out juror "was attempting to apply the law correctly," while the rest of the jury understood that the

accomplice's "exculpatory testimony could not be believed because it was uncorroborated." (*Id.* at p. 784.)

We review instructional error claims de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) We determine whether the trial court fully and fairly instructed the jury on the applicable law. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) When making this determination, we consider the instructions taken as a whole; we also presume jurors are intelligent people capable of understanding and correlating all of the instructions they were given. (*People v. Hajek and Vo* (2014) 58 Cal.4th 1144, 1220, overruled on other grounds by *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*Ramos, supra*, 163 Cal.App.4th at p. 1088.) The ultimate question is whether there is a reasonable likelihood the jury applied the instructions that were objected to in an impermissible manner. (*People v. Hajek and Vo, supra*, 58 Cal.4th at p. 1220.)

This case is distinguishable from *People v. Smith, supra*, 12 Cal.App.5th 766 as there was no hold-out juror and no indication that the jurors struggled with applying the corroboration requirement to Roberts's and Miranda's testimony. Moreover, Roberts's and Miranda's testimony that the gang was a brotherhood organized to protect its members to whom it provided a sense of family was not exculpatory. That testimony did nothing to undermine the fact that they had pleaded guilty to assaulting the victim in this case by means of force likely to cause great bodily injury and admitted committing the crime to benefit the Independent Riders. Additionally, their testimony did not impact the

elements of the gang participation charge or the gang enhancement as applied to Boissonnault. Our review of the entire record demonstrates beyond a reasonable doubt that even if the court had instructed the jury that Roberts's and Miranda's testimony was exculpatory and therefore required no corroboration, the result would not have been more favorable to Boissonnault. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

BENKE, Acting P. J.

AARON, J.